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NOTES.

RATIFICATION OF A VOIDABLE CORPORATE ACT BY A HOLDING COMPANY HAVING COMMON DIRECTORS.—A contract between a corporation and one or more of its directors individually, is almost universally regarded as voidable. The same is true in most jurisdictions when the contract is made with another company, in which the directors are interested as partners or heavy stockholders.[1] This results from the fiduciary character of a director, under the familiar doctrine that forbids an agent or trustee to contract with himself as a third person.[2] This same doctrine, however, allows ratification of the transaction by the principal or *cestui*, who, in the case of a voidable act by directors, is represented by

[1] 2 Machen, Corp., §§ 1563, 1581; 2 Thompson, Corp., (2nd ed.) 180, 221; 1 Morawetz, Priv. Corp., (2nd ed.) § 517 *et seq.*

[2] 2 Machen, Corp., § 1471 *et seq.*; Pearson *v.* R. R. (1883) 62 N. H. 537; Buell *v.* Buckingham & Co. (1864) 16 Ia. 284.

a majority of the stockholders of the corporation.[3] A contract by a director who is personally interested is not *ultra vires*,, and therefore a minority stockholder cannot object to ratification by the majority.[4] Moreover, since the right to vote has always inhered in the holder of the legal title to the stock, regardless of the existence of one beneficially interested,[5] it follows that a corporation which has the right to hold stock in another company has the right to vote such stock.[6] And since there is no valid distinction between the right to vote for the election of a director and to vote to ratify his acts, it seems clear that a holding company can validate the voidable acts of the directors of its subsidiary corporation.

These questions were presented in novel form in the recent case of *Brooklyn Heights R. R. Co.* v. *Brooklyn City R. R. Co.* (N. Y. 1912) 151 App. Div. 465. The plaintiff company made a voidable contract with the defendant company, in which its directors were personally interested. The same men were directors of a holding company which owned most of the plaintiff's stock, and in this capacity they ratified the contract. The court held that this ratification was not binding on the plaintiff, which was therefore permitted to avoid the contract. Were the question raised by the shareholders of the holding company, the result reached would be unimpeachable, because, obviously, the directors of such holding company bear a fiduciary relation to its stockholders, and the latter may avoid a transaction with a company represented by the same directors.[7]

But this power of the stockholders of the holding company thus to validate or to avoid their directors' ratification negatives the existence of the same power in the plaintiff company. The right to invalidate or ratify a voidable corporate act rests upon a fiduciary relationship,[8] and there is no such relation between the company which owns stock of the plaintiff, or its directors, and the plaintiff. A shareholder is in no sense a fiduciary for the corporation, but may act solely to further his own interests.[9] This well settled doctrine has an application closest

[3]Gamble *v.* Queens Co. Water Co. (1890) 123 N. Y. 91; Bjorngaard *v.* Goodhue Co. Bank (1892) 49 Minn. 483; Nye *v.* Storer (1897) 168 Mass. 53. A transaction tainted with actual fraud, however, cannot be thus ratified. Klein *v.* Ind. Brewing Ass'n (1908) 231 Ill. 594.

[4]2 Machen, Corp., § 1591; and cases in note 3, *supra.*

[5]Matter of N. S. S. I. Ferry Co. (N. Y. 1872) 63 Barb. 556.

[6]Oelbermann *v.* N. Y. & No. R. Co. (N. Y. 1894) 77 Hun 332; Davis *v.* U. S. Elec. etc. Co. (1893) 77 Md. 35; Clarke *v.* R. etc. Co. (1894) 62 Fed. 328; *contra,* Memphis & Charleston R. R. Co. *v.* Woods (1889) 88 Ala. 630; State *v.* Newman (1899) 51 La. Ann. 833. A contrary result may, however, be reached when the stock sought to be voted has been acquired *ultra vires.* Milbank *v.* N. Y. L. E. & W. R. R. Co. (N. Y. 1882) 64 How. Pr. 20.

[7]Abbot *v.* Am. Hard Rubber Co. (N. Y. 1861) 33 Barb. 578; see O'Connor M. & M. Co. *v.* Coosa Furnace Co. (1891) 95 Ala. 614; San Diego *v.* Pacific Beach Co. (1896) 112 Cal. 53; Hart *v.* Ogdensburg & L. C. R. R. Co. (N. Y. 1895) 89 Hun 316.

[8]See cases in note 2, *supra.*

[9]Windmuller *v.* Standard D. & D. Co. (1902) 114 Fed. 491; Blinn *v.* Riggs (1903) 110 Ill. App. 37. A concerted majority which uses its power to manipulate the corporation, may, however, be deemed to have a fiduciary relation to the minority stockholders. Farmers L. & T. Co. *v.* N. Y. & N. R. Co. (1896) 150 N. Y. 410; see 2 Machen, Corp., § 1301 *et seq.*; 22 Harv. L. Rev. 591.

to the principal case in those decisions unanimously allowing a director who personally owns stock to vote it on the question of ratifying his own voidable act, even when his stock is necessary to a majority, or itself constitutes a majority.[10] And a further example exists in the line of cases refusing to restrain a company owning a majority of the stock of another company from electing its own directors and officers to corresponding positions in the latter company,[11] even though, as shown above, subsequent transactions between the two companies thus having a common directorate will be voidable.[12] In short, though the ratification is voidable like the original contract, the initial right of the plaintiff to avoid the latter rests upon the right of the stockholders to be represented by disinterested directors, and when these stockholders have themselves acted, the plaintiff has no further power. The decision of the principal case, therefore, can be justified only by disregarding the separate existence of the holding company and by treating its stockholders as entitled to a direct voice in the management of the plaintiff corporation.

RIGHT OF A "VOLUNTEER" TO SUBROGATION AS AGAINST INTERVENING INCUMBRANCERS.—When the doctrine of subrogation was first established, it was restricted to sureties, or others who were compelled to pay because of some legal obligation, or in order to protect their own interests, and this gave rise to the maxim, "Subrogation is never granted to a volunteer."[1] With characteristic tenacity to familiar forms, the courts have endeavored to reconcile modern views to this old rule, but in so doing have been compelled, in order to meet the increasing demands for an extension of the subrogatory privilege beyond the limits of the early cases, to distort the word "volunteer" far beyond its original meaning; for this right will now generally be granted except to one who has officiously intermeddled in the affairs of the debtor.[2] Adherence to the old formula is, moreover, responsible for the result in a class of cases which do not logically seem to be governed by the same principles as those from which the rule was deduced. An illustration is afforded by the recent case of *Nelson* v. *McKee* (Ind. 1912) 99 N. E. 447. The plaintiff, who had no interest to protect by so doing, had discharged a mortgage due to a third person at the request of the mortgagor, and had taken a new mortgage at a lower rate of interest, without knowledge of the fact that the defendant had previously acquired a lien on the property by docketing a judgment. The court refused to preserve the discharged mortgage for the purpose of giving the plaintiff priority over the judgment lienor solely because he had acted voluntarily in paying off the first security.[3]

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[10]Northwest Transportation Co. *v.* Beatty (1887) L. R. 12 A. C. 589; U. S. Steel Corp. *v.* Hodge (1902) 64 N. J. Eq. 807; Green *v.* Felton (1908) 42 Ind. App. 675; *contra,* Miner *v.* Ice Co. (1892) 93 Mich. 97.

[11]Bigelow *v.* C. & H. Mining Co. (1909) 167 Fed. 721; see Leavenworth *v.* Chi. etc. Ry. Co. (1890) 134 U. S. 588.

[12]See cases in note 7, *supra.*

[1]See Sheldon, Subrogation, (2nd ed.) § 240 *et seq.*

[2]9 COLUMBIA LAW REVIEW 63; 13 Harv. L. Rev. 297.

[3]Where there is "conventional" subrogation, *i. e.,* an agreement with the debtor for subrogation, the plaintiff will not be held a volunteer. Home Savings Bank *v.* Bierstadt (1897) 168 Ill. 618. Such an agreement may be implied. Gore *v.* Brian (N. J. 1896) 35 Atl. 897. But as the agree-